STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 286, Complainant,	CASE 7450-U-88-1549
vs.	DECISION 3266 - PECB
CLOVER PARK SCHOOL DISTRICT, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hafer, Price, Rinehart & Schwerin, by John Burns, Attorney at Law, appeared on behalf of the union.

Melvin N. Neighbors, Assistant Superintendent for Personnel/Collective Bargaining, appeared on behalf of the employer.

On June 20, 1988, International Union of Operating Engineers, Local 286, filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the Clover Park School District had violated RCW 41.56.140(1) and (4), through its unilateral adoption of a policy restricting the use of tobacco. A hearing was held in Tacoma, Washington, on April 14, 1989, before Examiner Mark S. Downing. The union presented oral argument at the hearing. The employer filed a post-hearing brief on May 26, 1989.

BACKGROUND

The Clover Park School District provides educational services to students in southern Pierce County, Washington. The employer is

governed by an elected five-member board of directors. Charles Alexander is superintendent of schools.

International Union of Operating Engineers, Local 286, is the exclusive bargaining representative for a unit of approximately 130 custodial-maintenance and grounds personnel of the employer. The union and employer were parties to a collective bargaining agreement covering the period of September 1, 1985 through August 31, 1988. After the filing of this unfair labor practice complaint, but prior to the hearing herein, the parties signed a successor agreement for the period of September 1, 1988 through August 31, 1991.

Prior to 1988, the employer had tobacco use policies which prohibited students from smoking in any location on the employer's premises, but allowed employees to smoke in designated areas. At the regular meeting of the employer's board of directors held on December 14, 1987, the following discussion took place regarding changes in the employer's tobacco use policy:

> MATTERS FOR INFORMATION AND/OR CONSIDERATION
>
> 1. Smoking Policy--New
> (December--First Reading)
> (January--Board Action)
>
> [Board member] Mr. Ghilarducci explained for the benefit of the audience that a [sic] Smoking Policy" is being presented to the Board for its consideration, not for the public and the Board to debate. The responsibility of developing a policy has been given to the Superintendent.
>
> A discussion continued following the reading of the proposed policy by Jan Erickson, Chair of the Wellness Committee.
>
> [Board member] Mrs. Davis invited anyone interested in the policy to contact members of

> the Board with their suggestions as this issue will be studied throughout the next month.
>
> Mr. Alexander emphasized that from the input he had received concerning such a policy, the employees want to support it, whether or not they are in agreement with it in toto. He encouraged employees to submit written comments to the Board.

Exhibit 5 - Minutes of December 14, 1987.

At the January 11, 1988 meeting of the employer's board of directors, the following policy was proposed for adoption as Board Resolution 88-69:

> BE IT RESOLVED, that the following policy is adopted by the Board of Directors relative to the establishment of a Tobacco-Free Environment within Clover Park School District:
>
> > The Board of Directors recognizes the need to provide a Tobacco-Free Environment for students, staff, and the general public. In order to provide a healthy working environment, use of tobacco products in any form shall be prohibited in all buildings, grounds, and work sites of Clover Park School District.
> >
> > The effective date of this policy shall be July 1, 1989.

Exhibit 1 - Minutes of January 11, 1988.

The meeting was then opened for public participation, and comments were received from the American Cancer Society, medical professionals, vocational-technical institute instructors, teachers, students, bus drivers and the chairperson of the employer's Wellness Committee. No comments were received from the union involved in this unfair labor practice complaint or from any of its mem-

bers. Amendments permitting smoking in designated outside areas at the vocational-technical institute and changing the policy's effective date to September 1, 1988 were offered and approved. The new tobacco use policy, as so amended, was then adopted by the board at the January 11 meeting. The union's complaint challenging the employer's revised tobacco use policy followed, on June 20, 1988.

POSITIONS OF THE PARTIES

The union alleges that the employer adopted its tobacco use policy without notice to the union or an opportunity for bargaining. As a remedy, the union seeks an order requiring the employer to cease and desist from its ban on the use of tobacco products, and an order allowing the use of tobacco products in designated areas of buildings and work sites of employees, in conformance with Chapter 70.160 RCW (Washington Clean Indoor Air Act).

The employer argues that notice of the proposed policy was given to the union through the publishing of meeting agendas for each of the school board meetings. The employer maintains that local union officials attended board meetings and had the opportunity to view agenda documents made available at those meetings. The employer claims that the union waived its bargaining rights, by failing to request bargaining on the tobacco use policy until seven [sic] months after its adoption.

DISCUSSION

The Public Employees' Collective Bargaining Act imposes an obligation on an employer to refrain from making changes in any terms and

conditions of employment concerning mandatory subjects of bargaining, without first giving notice to the exclusive bargaining representative and providing that organization with a meaningful opportunity to bargain the subject. South Kitsap School District, Decision 472 (PECB, 1978), citing Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964). See, also, Soule Glass and Glazing Co. v. NLRB, 652 F.2d 1055 (1st Cir. 1981).

The Public Employment Relations Commission has held that restrictions placed on the use of tobacco by employees are mandatory subjects of collective bargaining. Kitsap County Fire District No. 7, Decision 2872-A (PECB, 1988). See, also, City of Seattle, Decisions 3051-A - 3054-A (PECB, 1989); Mason County, Decision 3108-A (PECB, 1989).[1] The employer has not argued otherwise here. Questions remain in this case as to whether the employer provided adequate notice to the union of its proposed change in the tobacco use policy, and as to whether the union has waived its bargaining rights.

Notice

As a general rule, an employer must provide formal notice to the union concerning contemplated changes in terms and conditions of employment. City of Kennewick, Decision 482-B (PECB, 1980); NLRB v. Sweet Lumber Co., 515 F.2d 785 (10th Cir. 1975). Notice must be given to the exclusive bargaining representative, as opposed to merely being given to employees represented by the union. Royal School District, Decision 1419-A (PECB, 1982). While written

[1] See, also, City of Chehalis, Decision 2803 (PECB, 1987), where it was held that there was a duty to bargain the "effects" or "impact" of a tobacco use ban, even if the employer was excused from bargaining the decision to impose such a ban.

notice is the most common practice, notice may also be given in a telephone call[2] or an in-person meeting.[3] Rumors, mere suspicion or conjecture cannot take the place of formal notice. NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2nd Cir. 1961); International Ladies' Garment Workers Union v. NLRB, 463 F.2d 907 (D.C. Cir. 1972); NLRB v. National Car Rental System, 672 F.2d 1182 (3rd Cir. 1982).

Notice provided by the employer must also be timely, that is, given sufficiently in advance of the actual implementation of a change to allow a reasonable opportunity for bargaining between the parties. City of Vancouver, Decision 808 (PECB, 1980); International Ladies' Garment Workers Union v. NLRB, supra; Ciba-Geigy Pharmaceuticals Division, 264 NLRB 1013 (1982). This requirement affords the union with the opportunity to explore all the possibilities, provide counter-arguments and offer alternative solutions or proposals regarding the issue raised by the proposed change. City of Centralia, supra; Gulf States Mfg., Inc. v. NLRB, 704 F.2d 1390 (5th Cir. 1983); Spokane County, Decision 2377 (PECB, 1986). If notice is provided in too short a time before implementation of the proposed change, there does not exist a reasonable opportunity for bargaining between the parties. In affirming a ruling by the National Labor Relations Board in International Ladies' Garment Workers Union v. NLRB, supra, a court stated:

> [N]o genuine bargaining ... can be conducted where the decision has already been made and implemented. Notice of a fait accompli is simply not the sort of timely notice upon which the waiver defense is predicated.

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2 See NLRB v. National Car Rental System, supra; City of Vancouver, Decision 808 (PECB, 1980).

3 See NLRB v. Spun-Jee Corp., 385 F.2d 379 (2nd Cir. 1967); City of Centralia, Decision 1534 (PECB, 1982).

Thus, notice is not considered to be timely where the employer presents a proposed change as a _fait accompli_. _City of Bellevue_, Decision 839 (PECB, 1980); _Royal School District_, _supra_; _Ciba-Geigy Pharmaceuticals Division_, _supra_; _Gulf States Mfg., Inc. v. NLRB_, _supra_.

In the situation at hand, the employer admits that no formal notice of the proposed change in tobacco use policy was given to the union. Absent formal notice to the union, an employer must prove that the union had actual, timely knowledge of the contemplated change. _Renton School District_, Decision 706 (EDUC, 1979); _Medicenter, Mid-South Hospital_, 221 NLRB 670 (1975); _NLRB v. Henry Vogt Machine Co._, 718 F.2d 802 (6th Cir. 1983). Actual knowledge has been found to exist where a union appeared before and addressed a city council at two public hearings on the issue in question. The Commission stated:

> [W]e conclude that it [the union] was aware of what was being considered by the city council sufficiently in advance of implementation that meaningful bargaining could have taken place. . . . by virtue of its own inaction in failing to make a timely request for bargaining given actual prior knowledge of the controversial proposal, the union waived its right to bargain on the matter.

City of Yakima, Decision 1124-A (PECB, 1981).

Here, the employer argues that notice was provided to the union through the attendance of union officials at school board meetings. The statutory obligation to bargain is not satisfied by an employer's expectation that a union will appear at an open, public meeting before the employer's "legislative" body to express its views regarding a proposed change. _Kitsap County Fire District No. 7_, Decision 2872, 2872-A (PECB, 1988). The union was not required

to attend school board meetings in order to learn of contemplated changes the employer was considering. The employer claims, however, that the union had actual knowledge of the proposed change in tobacco use policy through an employee member of the union negotiating committee who was in attendance at the December, 1987 board meeting for the first reading of the revised tobacco use policy. There is a gap in the chain, however, which distinguishes this case from City of Yakima, supra, and makes it more like Royal School District, supra. The employee who attended the December, 1987 board meeting did not convey information concerning the proposed change to the union business representative, and the union first learned of the proposed change later, through receipt of the minutes from the December, 1987 board meeting several days after the new policy was adopted at the January, 1988 board meeting.

Notice is only of value if given before an action is taken. Spokane County, supra. The union was not obligated to request bargaining where notice was not given by the employer before adoption of the proposed change.

Waiver

A union's right to notice and opportunity for bargaining concerning changes in terms and conditions of employment may be waived where the parties' collective bargaining agreement allows the employer to institute changes on particular subjects. The employer does not maintain here that its revision of the tobacco use policy was permitted by the parties' collective bargaining agreement.

Where notice concerning changes in terms and conditions of employment has been given by an employer, the obligation shifts to the union to request bargaining if it desires to exercise its statutory right to bargain. City of Pasco, Decision 2603 (PECB, 1987). A

union risks waiver of its bargaining rights by failing to request bargaining after adequate notice is received. Waiver is an affirmative defense, and an employer has the burden of demonstrating that a waiver has occurred. Lakewood School District, Decision 755-A (PECB, 1980); City of Seattle, Decision 1667 (PECB, 1983). In affirming a ruling by the National Labor Relations Board, a court stated:

> [A]ny waiver of the statutory right to bargain over a mandatory subject of bargaining must be clear and unmistakable. . . . Waiver of this right cannot be assumed.

Metromedia, Inc. v. NLRB, 232 NLRB 486 (1977), enforced 586 F.2d 1182 (8th Cir. 1978).

Thus, to establish a waiver by inaction, it must be shown that the union had clear notice of the employer's intent to institute a change sufficiently in advance of implementation of the change so as to afford the union a reasonable opportunity to bargain regarding the proposed change, and that the union failed to timely request bargaining. International Ladies' Garment Workers Union, supra.; Ciba-Geigy Pharmaceuticals Division, supra; NLRB v. Island Typographers, 705 F.2d 44 (2nd Cir. 1983); American Distributing Co., Inc. v. NLRB, 715 F.2d 446 (9th Cir. 1983); Spokane County, supra. A union cannot be found to have waived its bargaining rights when it never had an opportunity to bargain. Gulf States Mfg., Inc. v. NLRB, supra.

These "waiver" principles were discussed in a recent case involving the identical parties to this dispute. Clover Park School District, Decision 2560-A, 2560-B (PECB, 1988). Without notice to the union, the employer subcontracted certain custodial work, altering a mandatory subject of bargaining. The employer at no time offered or indicated a willingness to negotiate the matter. The union did

not specifically request negotiations on the subject, but protested the employer's action through the filing of an unfair labor practice complaint. The Examiner held that:

> Without advance notification of proposed changes and an opportunity to bargain, a union is presented with a fait accompli, and has no obligation to request bargaining. To make such a request in this case after the subcontractor had begun work would have been a futile gesture. [citation omitted] The union's failure to request bargaining after the fact of subcontracting having occurred does not constitute a basis for a finding of waiver by inaction.

Clover Park School District, Decision 2560-A (PECB, 1988).

Contrary to the employer's claim here that the union waived its right to bargain on the revised tobacco use policy by failing to request bargaining until seven months after its adoption, the union's obligation to request bargaining was not triggered in this matter. The employer failed to provide notice of the contemplated change to the union. The union's filing of its unfair labor practice complaint within the six month period of limitations set forth in RCW 41.56.160 constituted a timely and proper response by the union to the employer's action.[4] The employer has failed to prove that the union waived its bargaining rights concerning changes in the tobacco use policy.

Conclusion

Labor organizations are selected by employees to represent their interests in dealings with their public employers. Where employees

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[4] The complaint was filed five, not seven, months after adoption of the new policy.

have selected a bargaining representative, an employer is obligated to deal exclusively with that representative and not directly with individual employees concerning terms and conditions of employment. Communications between the union and employer concerning employment relations will not take place absent notice from one party to the other that a problem exists and certain subjects need to be discussed. As the National Labor Relations Board has stated:

> [S]eemingly, unsolvable problems can, upon occasion, be solved if the parties to a bargaining relationship confront each other honestly and openly across the bargaining table with their respective problems and positions. ... Moreover, the Union might have been able to advance a solution to the problems confronting Respondent, however remote that possibility may have been. It is not necessary that a satisfactory solution ... be the probable result of bargaining negotiations for the obligation to give notice and opportunity for discussion of such matter to be a viable and intrinsic part of the statutory bargaining obligation. The basic concepts of the [National Labor Relations] Act call for utilization of joint efforts at the bargaining table to solve difficult and seemingly insoluble problems as well as those more amenable to a resolution satisfactory to both sides. The Act does not, of course, compel agreement; it does compel notice and opportunity for discussion to the end that all possible bases for agreement are fully explored.

Royal Plating and Polishing Co., Inc., 148 NLRB 545 (1964).

Without notice, the communications process cannot even begin. Notice to the union and, upon request, collective bargaining in good faith is essential to the collective bargaining process.

FINDINGS OF FACT

1. The Clover Park School District is a public employer within the meaning of RCW 41.56.030(1).

2. International Union of Operating Engineers, Local 286, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative for a unit of custodial-maintenance and grounds personnel of the employer.

3. A revised tobacco use policy affecting employees represented by Local 286 was adopted by the employer's board of directors at its January 11, 1988 meeting.

4. No formal notice was provided by the employer to the union concerning contemplated changes in the employer's tobacco use policy.

5. Actual notice of the revised policy was not received by the union until several days after its adoption by the employer.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. By unilaterally adopting a tobacco use policy affecting its employees, without providing notice to and an opportunity for bargaining with the exclusive bargaining representative of its employees, the Clover Park School District has committed an unfair labor practice in violation of RCW 41.56.140(1) and (4).

ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, it is ordered that the Clover Park School District, its officers, elected officials, and agents, shall immediately:

1. Cease and desist from:

   a. Giving effect to the board resolution on the use of tobacco products adopted on January 11, 1988, and any other employer directives issued pursuant to that resolution.

   b. Refusing to bargain collectively in good faith with the International Union of Operating Engineers, Local 286 concerning tobacco use policies for employees in the bargaining unit represented by the union.

2. Take the following affirmative actions to remedy the unfair labor practices and effectuate the purposes of Chapter 41.56 RCW:

   a. Give notice to and, upon request, bargain collectively in good faith with the International Union of Operating Engineers, Local 286 concerning tobacco use policies for employees in the bargaining unit represented by the union.

   b. Post, in conspicuous places on the employer's premises where notices to all employees are customarily posted, copies of the notice attached hereto. Such notices shall, after being duly signed by an authorized representative of the respondent, be and remain posted for 60

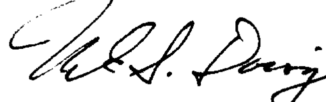
days. Reasonable steps shall be taken by the respondent to ensure that said notices are not removed, altered, defaced, or covered by other material.

c. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply herewith, and at the same time provide the complainant with a signed copy of the notice required by this order.

d. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

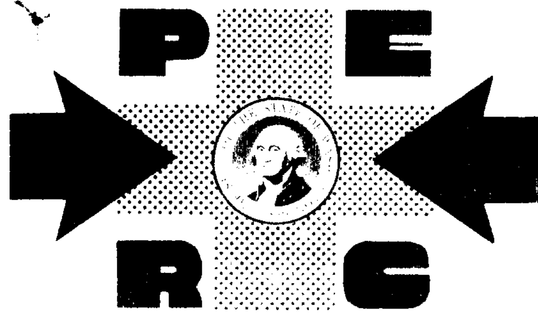
DATED at Olympia, Washington, this 16th day of August, 1989.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARK S. DOWNING, Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE PUBLIC EMPLOYEES' COLLECTIVE BARGAINING ACT, CHAPTER 41.56 RCW, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain collectively with the International Union of Operating Engineers, Local 286 regarding tobacco use policies for employees represented by the union.

WE WILL NOT give effect to the board resolution on the use of tobacco products adopted on January 11, 1988, or to any other employer directives issued pursuant to that resolution.

DATED ____________________

CLOVER PARK SCHOOL DISTRICT

By: ____________________________
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for sixty (60) days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Mail Stop FJ-61, Olympia, Washington 98504. Telephone: (206) 753-3444.